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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEE ROGERS, Defendant and Appellant.	G051486 (Super. Ct. No. 14CF3275) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Donald W. Ostertag, and Ryan H. Peeck Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant Christopher Lee Rogers guilty of assault, aggravated to a felony for being a hate crime (Pen. Code, §§ 240, subd. (a), 422.7, subd. (a); count 1),[1] disorderly conduct (loitering on private property) (§ 647, subd. (h); count 2); and disturbing the peace (offensive words) (§ 415, subd. (3); count 3). The court sentenced defendant to the low term of 16 months in jail on count 1, and a concurrent term of 6 months in jail on counts 2 and 3, for a total sentence of 16 months. On appeal, defendant contends the evidence as to count 1 compelled a finding that defendant acted in self-defense, and that the evidence was insufficient to support the verdict on count 2. We affirm.

FACTS

Ruben Borroel and his sons, Juan and Alfredo, own and operate an automobile repair shop in Santa Ana. One afternoon in May 2014, the three of them were standing across the street from the repair shop, when their attention was drawn to defendant, who was standing on the opposite sidewalk, nearest the business, yelling belligerently towards the repair shop. They heard defendant yelling words to the effect of, "I can't get a job because of you Mexicans." Juan engaged defendant in some conversation while Reuben returned to the shop to get a tool. Defendant entered the workshop, picked up a broom, and started sweeping. Juan and Reuben ordered defendant to leave the workshop, but defendant did not comply. He started making comments to the effect of "[if] you are Mexican, go back to Mexico," and used the slur "wetback."

At that point Juan and Alfredo began pushing defendant away from the workshop and managed to get him onto the sidewalk and some distance down the street. Defendant then "started coming back" and swung at Reuben, but the punch "just scraped

[1] All statutory references are to the Penal Code.

the lower part of his chin." Alfredo responded by punching defendant in the nose. At this point, defendant was on the sidewalk.

Defendant then called 911and threatened the Borroels that they would be deported as a result of the incident and again used the racial slur "wetback." After calling the police, defendant again approached the business and began bantering with a client who was at the business.

By the time Officer Michael McCarthy of the Santa Ana Police Department arrived, defendant had left. Officer McCarthy recalled interviewing Juan, who stated at the time that, prior to him crossing the street to confront defendant, defendant had, in addition to hurling racial slurs, challenged the employees to come out and fight. Officer McCarthy recalled a specific statement Juan had reported defendant making, which was, "Fuck you, you wetback, Mexican, get out of America."

After interviewing Juan, Officer McCarthy located defendant one block north of the auto shop. Defendant was agitated and refused to provide any details regarding the incident, instead making statements such as that the Mexicans in Santa Ana needed to leave and get out of the country. Officer McCarthy warned defendant that such statements could put defendant in danger, but defendant responded by telling him to "fuck off, that he could say what the fuck he wants." Defendant then told Officer McCarthy that he was not qualified to speak to defendant because Officer McCarthy probably was not from America. Defendant appeared to be under the influence of alcohol.

DISCUSSION

Defendant's first contention is that the evidence was such that it was "*impossible* to rationally conclude . . . that [defendant] did not act in self defense." We disagree.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

CALCRIM No. 3470 describes the following elements of self-defense: "1. The defendant reasonably believed [he] was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully]; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger." (See §§ 692, 693.)

Even assuming defendant was subject to an unlawful touching by Juan and Alfredo because they pushed him beyond the boundaries of the auto shop and some way down the street, the jury could rationally conclude defendant did not act in self-defense. Defendant attempted to punch Ruben. Although Ruben was with his sons, there is no evidence Ruben touched defendant, nor any evidence that Ruben was about to touch defendant. Defendant responds, "It is abundantly clear that the Borroels were acting in concert, and it is therefore irrelevant whether it was Ruben himself or one of his children who battered appellant is of no consequence." We disagree. Even if Ruben was acting in concert with his sons, a jury could rationally conclude that swinging at Ruben was not necessary to defend against the actual touching that occurred.

Moreover, Juan's testimony was not that defendant swung at Ruben while the brothers were escorting defendant down the street, but instead that defendant "started coming back" and swung at Reuben. From this testimony the jury could rationally conclude the brothers had finished moving defendant down the street, and defendant was initiating a new physical confrontation, which would negate self-defense.

Defendant's second contention is that the evidence was insufficient to support count 2, disorderly conduct. Section 647 defines disorderly conduct as follows: "every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:" "(h) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. As used in this subdivision, 'loiter' means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered."

Defendant's argument is based on testimony that his entry into the business was brief: The "evidence clearly establishes that [defendant's] entry into the Borroel garage was fleeting and momentary, and was for the purpose of picking up a broom to demonstrate, [facetiously] perhaps, that he wanted a job sweeping up the premises." Defendant takes too narrow a view of the incident. Defendant's entry onto the property was part of a broader course of conduct in which he was drunk and belligerently disturbing the peace. He entered the business, was instructed to leave, and refused to do so. The jury could rationally conclude he was not trying to demonstrate his suitability for employment, but was loitering to disturb the peace by continuing his racist tirade against Mexicans who he believed had taken his job opportunities.[2] This evidence was sufficient to support the disorderly conduct charge.

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[2] Section 415 sets forth three categories of disturbing the peace, including, "(3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction." The jury convicted defendant of violating this

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.

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statute in count 3, and defendant does not challenge that portion of the judgment.